



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KITALE**

**LAND CASE NO. 75 OF 2015**

**ALEXANDER A. REUBEN.....PLAINTIFF**

**VERSUS**

**NGURIATUDO NGIROO.....1<sup>ST</sup> DEFENDANT**

**JOSEPH NG'IROO CHACHAKIN...2<sup>ND</sup> DEFENDANT**

**RULING**

**The Application**

1. The Notice of Motion application dated 22/10/2020 and filed in court on 23/10/2020, has been brought under **Section 3A** of the **Civil Procedure Act, Order 51 Rule 1** of the **Civil Procedure Rules, 2010**. The defendants seek the following orders:-

**1. ...spent**

**2. ...spent**

**3. That there be a stay of execution of the decree herein and all consequential orders arising from the judgment in this matter which was delivered on 30/7/2020 be stayed pending the hearing and determination of the applicants' appeal before the Court of Appeal.**

**4. That costs of this application be costs in the appeal.**

2. The application is supported by the affidavit filed on 22/10/2020 by the 1<sup>st</sup> defendant who asserts that he has authority from the 2<sup>nd</sup> defendant to swear the affidavit.

**The Response**

3. The plaintiff filed a replying affidavit sworn on 5/11/2020.

**Submissions**

4. The plaintiff filed his written submissions on 9/11/2020. The defendants filed their submissions on 17/11/2020.

**Determination**

5. The issue that arises in the instant application is whether an order of stay of execution pending appeal should issue in this case. Stay of execution is governed by order 46 rule 6 of the civil procedure rules. That order provides as follows:

**“6.(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made**

by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under sub-rule (1) unless -

(a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

(3) Notwithstanding anything contained in sub-rule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) Notwithstanding anything contained in sub-rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

6. In accordance with the provisions set out as above this court must therefore consider whether:

(i) There is an appeal in place;

(ii) The application was made without unreasonable delay;

(iii) Substantial loss may result unless the order is made; and

(iii) The Applicant is prepared to offer security.

7. The applicants have clearly demonstrated that there is an appeal, **Eldoret Civil Appeal No. 41 of 2020** filed on **15/10/2020** and in my view this is sufficiently meets the requirements of an appeal in **Order 42**.

8. The second issue is whether there has been unreasonable delay in the filing of the application. Judgement in this matter was delivered on **30/7/2020** and the instant application was filed on **23/10/2020**. I do not consider the delay of less than three months to be unreasonable delay.

9. As to whether substantial loss may result if the orders sought are not granted it is noteworthy that the judgment ordered that the defendants and all persons claiming under them to vacate the suit land within a period of **90 days** from the date of the judgment and in default they be evicted forcibly therefrom. If the defendants vacated the suit land or if they were evicted therefrom while an appeal is still pending, they may suffer substantial loss and the appeal may be rendered nugatory. It is the right of every litigant to approach an appellate court and get a second opinion therefrom and only a stay of execution can protect the litigant’s exercise of that right from being rendered merely academic by means of execution. This court is of the opinion that the defendants should be granted a chance to ventilate the issues at the appellate level before that eviction takes place if at all.

10. As for security, I find that even where security has not been offered the court may order security. I hereby find that the application dated **22/10/2020** has merit and I grant it as prayed in **Prayer No. (3)** thereof. The costs of the application shall be costs in the appeal. In addition the applicants shall deposit in an interest earning account held between counsel for both parties a sum of **Kshs. 200,000/=** being security for costs of the suit and the appeal within **60 days** of this ruling failure to which the orders of stay shall stand automatically vacated.

It is so ordered.

**Dated, signed and delivered at Kitale via electronic mail on this 26<sup>th</sup> day of January, 2021.**

**MWANGI NJOROGE**

**JUDGE, ELC, KITALE.**